

BEFORE THE PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI

In the Matter of the Application of Grain Belt Express)
Clean Line LLC for a Certificate of Convenience and)
Necessity Authorizing it to Construct, Own, Operate,) **File No. EA-2016-0358**
Control, Manage and Maintain a High Voltage, Direct)
Current Transmission Line and an Associated Converter)
Station Providing an Interconnection on the Maywood -)
Montgomery 345kV Transmission Line)

ORDER DENYING MOTIONS TO COMPEL

Issue Date: December 21, 2016

Effective Date: December 21, 2016

On August 30, 2016, Grain Belt Express Clean Line LLC ("Grain Belt Express") filed an application with the Missouri Public Service Commission ("Commission") for a Certificate of Convenience and Necessity to construct, own, operate, control, manage and maintain a high voltage, direct current transmission line and associated facilities within Buchanan, Clinton, Caldwell, Carroll, Chariton, Randolph, Monroe and Ralls Counties, Missouri, as well as an associated converter station in Ralls County. In its *Order Setting Procedural Schedule and Other Procedural Requirements* issued on October 19, 2016, the Commission ordered that any pending written discovery motion may be ruled upon by the presiding regulatory law judge either on the record or in a written order.

Motion to Compel- Grain Belt Express

On November 30, 2016, the Missouri Landowners Alliance ("MLA") filed a motion seeking to compel Grain Belt Express to further respond to two data requests numbered DB40 and DB41 that MLA had previously directed to Grain Belt Express and requesting that the Commission take administrative notice of Exhibit 335HC from File No.

EA-2014-0207. Those data requests sought information regarding responses provided to Grain Belt Express from potential wind farm generators pursuant to a request for information (“RFI”) and identification of the wind generators it used to calculate the lowest-priced cost of energy mentioned in the direct testimony of Grain Belt Express witness David Berry. In response to the data requests, Grain Belt Express provided several hundred pages of documents, including (1) a list of wind generators who responded to the RFI; (2) its internal credit analysis of those respondents; (3) a list of wind farm projects that responded to the RFI; (4) a map indicating the number of responding wind farms in western Kansas, western Oklahoma and the Texas panhandle by county; (5) proprietary summaries of the RFI’s, including aggregated pricing and wind speed information; and (6) copies of all responses to the RFI with limited redactions relating to the identity of the respondents and the specific locations of their projects. MLA was not satisfied with Grain Belt Express’ responses, as the information provided did not link the identity and precise location of the wind farm generators with specific wind speed and pricing information. The motion to compel was filed after the parties were unable to resolve their dispute through either negotiation or the procedures required in Commission Rule 4 CSR 240-2.090(8).

MLA argues that it needs to link the responses to the RFI to the name of each responding wind farm generator to (1) determine if the cost of energy estimates are correlated with creditworthiness; (2) confirm or challenge the projected wind speeds and pricing estimates; and (3) cross-reference the data from the RFI with the wind farm generator’s responses to Grain Belt Express’ open solicitation for capacity bids on the proposed transmission line. Grain Belt Express argues that the information requested by MLA is not relevant to the issues in this case; disclosure of that confidential information

would reveal trade secrets of the wind farm generators and result in harm to their business interests; requiring disclosure may result in Grain Belt Express being unable to acquire such information in the future; and the general range of wind speeds in western Kansas is public information. Infinity Wind Power (“Infinity”), an intervenor in this matter, joins in Grain Belt Express’ arguments.¹

Parties may obtain discovery regarding any matter, not privileged, that is relevant to a pending action or reasonably calculated to lead to the discovery of admissible evidence.² Missouri’s courts have indicated that there are two aspects to relevance - logical relevance and legal relevance.³ Logical relevance simply means that the questioned evidence tends to make the existence of a material fact more or less probable.⁴ MLA argues that the information requested is relevant because it relates directly to the projected price of energy from the wind farms on the proposed transmission line. Grain Belt Express argues that the information it withheld from MLA is not relevant but admits that whether the project can provide low-cost wind power to Missouri is relevant. Therefore, the information MLA seeks is logically relevant because it concerns whether the proposed transmission line is economically feasible.

The more difficult question is whether the information MLA seeks is also legally relevant. In deciding whether a party should be allowed to discover certain information, the

¹ Infinity also filed a motion for a protective order on December 13, 2016 regarding the data requests DB40 and DB41 issued to Grain Belt Express and others issued to the Missouri Joint Municipal Electric Utility Commission. The Commission will rule on Infinity’s motion after the time for responses has expired.

² Mo. Sup. Ct. Rule 56.01(b)(1). Commission Rule 4 CSR 240-2.090(1) provides that discovery in matters before the Commission may be obtained by the same means and under the same conditions as in civil actions in the circuit court.

³ *State v. Kennedy*, 107 SW 3d 306, 311 (Mo. App. 2003). That two-part relevance test is used to analyze the appropriateness of an administrative investigative subpoena in *Jackson v. Mills*, 142 SW 3d 237 (Mo. App. 2004).

⁴ *State v. Kennedy*, at 311.

court, or administrative agency, must weigh “the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulativeness, or violations of confidentiality. Evidence is legally relevant if its probative value outweighs its prejudicial effect.”⁵ In this case the prejudicial effect of disclosure to Grain Belt Express and the wind farm generators is great, as pricing and wind speed information is the most valuable trade secret of a wind generator. Disclosure of this information would cause Grain Belt Express to violate confidentiality agreements with the RFI respondents. Requiring violation of these agreements will subject Grain Belt Express to the risk of litigation and harm the wind generators’ ability to negotiate power purchase agreements with potential customers. Disclosure of such confidential information could result in wind generators and their contractors declining to provide any RFI information for future projects, which would prevent future applicants from obtaining this type of information.

The probative value of the additional information MLA seeks is relatively low. Grain Belt Express has already provided considerable information in response to MLA’s data requests that will permit MLA to develop close estimates of the wind speed and pricing information necessary to verify or challenge the energy cost estimates presented by Grain Belt Express. The balancing test for legal relevance indicates that the value of this additional information is outweighed by the prejudicial effects to Grain Belt Express and the wind farm generators that responded to the RFI. Even the Commission’s classification of this information as highly confidential in its records would not adequately protect these parties from disclosure to their competitors’ attorneys and experts. Therefore, the

⁵ *Jackson v. Mills*, 142 SW 3d 237, 240 (Mo. App. 2004).

Commission will deny MLA's motion to compel disclosure of the requested information from Grain Belt Express.

No party has objected to MLA's request for the Commission to take administrative notice of Exhibit 335HC from File No. EA-2014-0207. Since the Commission can take administrative notice of its own records, the Commission will grant this unopposed request.

Motion to Compel- Sierra Club

On December 1, 2016, MLA filed a motion seeking to compel Sierra Club, an intervenor in this proceeding, to respond to data requests numbered SC6 to SC13. Those data requests seek information from Sierra Club about the source of statements made in an email allegedly sent on June 13, 2016 by John Hickey, director of the Sierra Club's Missouri chapter. Those statements relate to the vote of three Commissioners in a prior similar case that is now closed. MLA states that it wants the source of those allegations in order that it may address them. Sierra Club objected to the data requests on the grounds that the matter is irrelevant and immaterial to this case; the thought process of an administrative decision-maker is not a proper subject for discovery; and any statements by a Sierra Club employee on that subject would be speculation.

Any evidence requested through discovery must appear relevant and material, or tend to lead to the discovery of admissible evidence.⁶ The information sought by MLA may be of interest to it, but that information is not relevant or material to this proceeding, as it relates to a separate closed case. What a Sierra Club employee may have heard about a Commissioner's prior vote would be speculative and would constitute hearsay, so it would

⁶ Mo. Sup. Ct. Rule 56.01(b)(1); *State ex rel. Anheuser v. Nolan*, 692 S.W.2d 325, 327 (Mo. App. 1985).

not be admissible. Therefore, the Commission will deny MLA's motion to compel against Sierra Club.

THE COMMISSION ORDERS THAT:

1. The Missouri Landowners Alliance's motion to compel against Grain Belt Express Clean Line LLC filed on November 30, 2016, is denied.
2. The Missouri Landowners Alliance's motion to compel against Sierra Club filed on December 1, 2016, is denied.
3. The Commission takes administrative notice of Exhibit 335HC from File No. EA-2014-0207.
4. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in dark ink that reads "Morris L. Woodruff". The signature is written in a cursive, flowing style.

Morris L. Woodruff
Secretary

Michael Bushmann, Senior Regulatory
Law Judge by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 21st day of December, 2016.